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No. 07-767

IN THE

Supreme Court of the United States

JAMES D. ALJIAN, KIRK KERKORIAN, AND TRACINDA CORPORATION,

Petitioners,

v.

DONALD JOHNSON, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a timely claim for insider trading brought within the express statutory five year limitations period of Section 20A of the Securities Exchange Act of 1934 (the "Exchange Act"), 15 U.S.C. § 78t-1, requires the pleading of a predicate violation that is itself timely under the balance of the Exchange Act's then applicable three year period of repose.

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BRIEF IN OPPOSITION

This case involves a unanimous circuit court panel's straightforward and correct application of well-settled legal principles. Petitioners seek to have this Court review for correctness the Ninth Circuit's application of the plain language of the five year limitations period set forth in Section 20A of the Exchange Act. The Ninth Circuit's holding is not at odds with the holdings of this Court or other courts. Accordingly, certiorari review is unwarranted.

STATUTORY PROVISION INVOLVED

Section 20A provides a cause of action against "[a]ny person who violates any provision of this chapter or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information" provided that such action is not brought "more than 5 years after the date of the last transaction that is the subject of the violation." 15 U.S.C. § 78t-1(a)(b)(4).

STATEMENT OF THE CASE

A. Factual Background

On February 24, 1999, defendant James Aljian ("Aljian") attended a meeting of DaimlerChrysler AG's ("DaimlerChrysler") Shareholders Committee and was provided with a "strictly confidential" and non-public report (the "Board Report") concerning DaimlerChrysler's Operative Planning for 1999-2001. The Board Report stated that DaimlerChrysler would experience a "significant" decline in free cash flow, in the amount of 2.520 billion euros ($2.69 billion) before net new business for 1999, and a

"significant" overall free cash flow decline of 1.510 billion euros ($1.69 billion).

After the meeting, Aljian returned to the offices of defendant Tracinda Corporation ("Tracinda"), a private investment corporation owned by defendant Kirk Kerkorian ("Kerkorian") and placed the Board Report in Tracinda's central files – Kerkorian's access to which was unrestricted. Thereafter, Aljian had conversations with Kerkorian regarding whether to sell shares of DaimlerChrysler that Tracinda owned. Between March 19 and June 11, 1999, Tracinda sold, at the direction of Aljian and Kerkorian, 7,642,241 shares of DaimlerChrysler for net proceeds of $661,667,282. Prior to these sales, Tracinda had never sold a single share of DaimlerChrysler common stock in its history.

Shortly after these sales were completed, on July 29, 1999, information regarding DaimlerChrysler's declining cash flow went public, resulting in an 8.8% decline in the price of DaimlerChrysler stock. Petitioners' insider trading, which allowed Petitioners to avoid approximately $120 million in losses at the expense of the putative class, violated the federal securities laws.

B. Proceedings In The District Court

On January 23, 2004, after being appointed as Lead Plaintiff in the Action, Glenn Rumsey ("Rumsey") filed the First Amended Class Action Complaint (the "Complaint"), asserting four causes of action: violations of Section 10(b) of the Exchange Act by Aljian, Kerkorian, and Tracinda for insider trading; violations of Section 20(a) of the Exchange Act by Aljian and Kerkorian as control persons of Tracinda; violations of Section 20A(a) against Aljian, Kerkorian, and Tracinda for insider trading; and violations of Section 20A(c) against Aljian for "tipping" inside information to Kerkorian and Tracinda.

On March 29, 2004, Petitioners filed motions to dismiss the Complaint.

On July 30, 2004, the District Court granted in part, and denied in part, Petitioners' motions to dismiss. The District Court dismissed as time-barred, Respondent's Section 10(b) and Section 20(a) claims solely because they were asserted after the running of the three year statute of repose. The District Court denied Petitioners' motions to dismiss as to the Section 20A claims, holding that i) the Complaint properly pleaded the necessary predicate violation of the Exchange Act (as well as the balance of elements constituting timely Section 20(A) claims); and ii) the Section 20A claims are timely because they were filed within the five year limitations period expressly set forth in Section 20A.

On October 19, 2004, on a motion by Petitioners, the District Court certified for interlocutory appeal pursuant to 28 U.S.C. § 1292(b), the question of:

> "whether a cause of action [that is] barred by its own statute of repose may serve as a predicate act to support a cause of action under Section 20A of the Securities Exchange Act of 1934, 15 U.S.C. § 78t-1."

October 27, 2004, Petitioners petitioned the Court of Appeals, and on November 18, 2004, the Court of Appeals accepted Petitioners' appeal.

C. Proceedings In The Court Of Appeals

In their appeal, Petitioners argued that a claim under Section 20A requires a temporally "*actionable* independent underlying violation" of the Exchange Act. App. Br. at 9 (emphasis added). In support of that position, Petitioners advanced three core arguments.

Petitioners eschewed an analysis of the plain language of Section 20A, (which does not state that the predicate violation need be temporally actionable) and instead argued

that Section 20A's legislative history compelled a result opposite that set forth by the plain language of Section 20A.

Petitioners argued that compliance with the statute of limitations was an "element" of the predicate violation of the Exchange Act under the precedent of the Ninth Circuit and this Court.

Petitioners suggested that the District Court had erred by rejecting their reliance on *Jackson Nat'l Life Ins. Co. v. Merrill Lynch & Co.*, 32 F.3d 697, 703 (2d Cir. 1994), which held that Section 20A of the Exchange Act requires a predicate violation of the Exchange Act, in the context of rejecting an attempt to base a Section 20A claim on violations of Sections 11 and 12(2) of the Securities Act of 1933. 15 U.S.C. § 77a et seq. Petitioners specifically argued that *Jackson* was probative to the Ninth Circuit's inquiry due to the similarity of the limitations periods of the Exchange Act and the Securities Act, even though they are wholly different statutes, with wholly different purposes.

The Ninth Circuit heard oral argument on January 8, 2007. On June 20, 2007, the Ninth Circuit panel unanimously affirmed the decision of the District Court. *See* Pet. App. A.

In affirming the decision of the District Court, the Ninth Circuit relied heavily, as it must, on the plain language of the statutory provision at issue, and rejected Petitioners' attempts to foment the opposite result through reliance on selectively quoted portions of Section 20A's legislative history. Specifically, the Ninth Circuit noted that Section 20A, on its face, requires only that a plaintiff allege a *violation* of the Exchange Act as a predicate to the pleading of a Section 20A claim. 490 F.3d at 781 ("The term "violates" in Section 20A is crucial. Claims under Section 20A are derivative and therefore require an independent ***violation*** of the Exchange Act.") (emphasis added). Accordingly, the Ninth Circuit properly rejected Petitioners' attempt to rewrite Section 20A

to include "modifying or restricting terms as 'viable,' 'actionable,' or 'timely'" that would have the effect of creating a pleading requirement that tied the viability of a Section 20A to the temporal viability of the predicate violation of the Exchange Act. *Id.* The Ninth Circuit continued, finding that under "common understanding" a "violation" of the law occurs the moment a law is broken – regardless of whether "a timely action commenced or a successful prosecution resulted" and that, as such, so long as the Section 20A claim was brought within its own five year limitations period, that claim was timely *and* properly pleaded. *Id.*

The Ninth Circuit also rejected Petitioners' other core argument: that pleading compliance with the statute of limitations was a necessary "element" of Section 10(b) and that no "violation" of Section 10(b) can be said to have occurred once its limitations period runs. In rejecting Petitioners' argument, the Ninth Circuit noted that this Court recently listed the elements of a Section 10(b) claim, and did not include compliance with any limitations period as an element. *Id.* citing *Dura Pharms., Inc. v. Broudo*, 544 U.S. 336 (2005)). The Ninth Circuit noted the logic of this position, given that as the Exchange Act itself contained[1] no limitations provisions for claims under Section 10(b) (those having been created by this Court in *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 364 (1991)), it could not follow that compliance with a limitations period

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[1] The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, enacted July 30, 2002, extended the three year period of repose for Section 10(b) claims created in *Lampf*, 501 U.S. at 364, to five years. In 1999, when the subject insider trades occurred, no express statutory limitations period for Section 10(b) claims was contained within the Exchange Act.

was an express element of a claim under Section 10(b). 490 F.3d at 783.

Finally, the Ninth Circuit rejected Petitioners' reliance on *Jackson*, because, *inter alia*, that case involved "rejecting an attempt to base a Section 20A claim on violations of Sections 11 and 12(2) of the Securities Act of 1933" in direct contravention of Section 20A's requirement of a predicate violation of the Exchange Act. 490 F.3d at 784.

In response to the Ninth Circuit panel's unanimous decision affirming the District Court, Petitioners sought panel and en banc rehearing. On August 9, 2007, the panel summarily denied any rehearing, with no judge voting for en banc review. *See* Pet. App. C.

The Petition timely followed.

REASONS FOR DENYING THE PETITION

This Court should deny the Petition because Petitioners fail to demonstrate any compelling reason to grant it. There is no split in the circuits regarding whether Section 20A requires that the predicate violation of the Exchange Act be timely. Nor did the Ninth Circuit improperly apply the precedent of this Court.

Instead of offering compelling reasons, Petitioners offer nothing more than the suggestion that this Court should review the correctness of the Ninth Circuit's application of the proper (and well-settled) legal standard of review of clear and plain statutory language. That is insufficient to justify this Court's review.

Indeed, Petitioners implicitly concede that there is no dispute as to the appropriate legal standard for review of statutory provisions, as their Petition consists of little more than their prior briefs, reargued, rather than an attempt to show *how* the Ninth Circuit's reading of the plain language of Section 20A is at odds with the precedent of this Court or

any circuit. In any case, the Ninth Circuit engaged in the requisite proper analysis and presented straightforward and logical conclusions. It did not depart from this Court's decisions, and its decision does not conflict with the holdings of other circuits.

I. There Is No Reason To Grant Certiorari

A. The Court Of Appeals Correctly Applied Established Law And Its Decision Is Not In Conflict With The Decisions Of This Court

The Ninth Circuit, without announcing new legal rules or departing from this Court's precedent, expressly cited and applied well-established legal standards and plain statutory language in its review of Section 20A's limitations provision. *See* Pet. App. A. Accordingly, Petitioners at best allege the misapplication of a properly stated rule of law. Nor do Petitioners identify any reason why the Court should diverge from its own rule disfavoring review of such questions. Further, and in any case, Petitioners' contention that the Ninth Circuit failed to apply established precedent is meritless.

1. Section 20A Does Not Require the Pleading of a Timely Predicate Violation

The plain language of Section 20A is clear.

> Any person who violates any provision of this title [15 U.S.C. §§ 78a et seq.] or the rules or regulations thereunder by purchasing or selling a security while in possession of material, nonpublic information shall be liable in an action in any court of competent jurisdiction to any person who, contemporaneously with the purchase or sale

> of securities that is the subject of such violation, has purchased (where such violation is based on a sale of securities) or sold (where such violation is based on a purchase of securities) securities of the same class.[...]

provided that such action is brought no more than "5 years after the date of the last transaction that is the subject of the violation." 15 U.S.C. § 78t-1(a), b(4).

Thus, to state a claim, all a plaintiff need do is (1) allege a predicate violation of the Exchange Act (or its rules and regulations), e.g., Section 10(b); (2) allege that s/he has standing to sue under Section 20A because s/he 'contemporaneously with the purchase or sale of securities that is the subject of such violation has purchased ... or sold ... securities of the same class' as the insider defendant; and (3) bring the action within "5 years after" the last insider trade at issue. *Id.* Nowhere in the statute is there any language that supports Petitioners' suggestion that the predicate violation must itself be timely. Given that Section 20A is plain on its face, no further inquiry is necessary or warranted. *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992) ("Where the plain language of a statute is clear on its face, a court should look no further to interpret that statute.").[2]

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[2] The plain language of the statute is in line with its legislative history, which recognizes the overwhelming flaw underlying Petitioner's suggestion: that Congress enacted Section 20A with a five year limitations period because it recognized the unique difficulties in identifying insider trading and adopted the longer limitations period as one of "a variety of measures designed to provide greater deterrence, detection and punishment of violations of insider trading." H.R. Rep. No. 100-910, at 7 (1988). Adoption of Petitioners' argument would frustrate this important purpose as under Petitioners' proposed regime, a

This is particularly so as the balance of Petitioners' arguments are predicated on the assumption that Section 20A contains a requirement that the predicate violation be "actionable" in a temporal sense. In the absence of such a showing, the balance of Petitioners' arguments must. Setting aside this fatal flaw in Petitioners' reasoning, and assuming, *arguendo*, that Section 20A contains such a requirement, the balance of Petitioners' arguments still must fail.

2. The Statute of Limitations is not a Pleading Element of Section 10(b)

Petitioners argue that compliance with a statute of limitations is a pleading element of every claim. Pet. at 9-11. In so doing, Petitioners rely on this Court's "120 year" old

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plaintiff would never be entitled to the extended protections of 20A because there would never be a situation where a plaintiff could bring a claim for insider trading out to the full five year period provided by the statute – a plaintiff would always be limited by Section 10(b)'s three year repose period. Numerous courts have recognized the important policy considerations that led Congress to adopt a five year limitations period for Section 20A claims. *See Short v. Belleville Shoe Mfg.* Co., 908 F.2d 1385, 1392 (7th Cir. 1990), *cert. denied,* 501 U.S. 1250 (1991) ("Section 20A may use a five year period, and be drafted as an ordinary statute of limitations, precisely because the reasons for setting the shorter one and three period for fraud are not present."); *Newby v. Lay (In re Enron Corp. Sec., Derivative & ERISA Litig.)*, 258 F. Supp. 2d 576, 601 (S.D. Tex 2003) ("Congress, concerned with the obstacles to discovering evidence of insider trading, enacted § 20A as an express private right of action and as one of a variety of measures designed to provide greater deterrence, detection and punishment of violations of insider trading, and provided it with a longer, five year statute of limitations.")(citation omitted).

recognition of the "integral nature of a statute of limitations to *liability* from a cause of action." Pet. at 9 (emphasis added). Petitioners' own choice of language supports exactly that which Respondent has argued all along: that compliance with a limitations period goes to the question of whether a defendant will be ultimately liable for a claim, and not whether he has *violated* the law. Here, it is of no import whether Petitioners will ultimately be liable for their violation of Section 10(b); it only matters for the purposes of Section 20A whether they *violated* Section 10(b). This is in line with the recent precedent of this Court, cited and relied upon by the Ninth Circuit in its opinion, which characterizes compliance with the statute of limitations as an "affirmative defense" and not an element of a claim. 490 F.3d 783 n.13 quoting *Jones v. Bock*, 127 S. Ct. 910, 920 (2007) ("even though 'the complaint is subject to dismissal for failure to state a claim' because the 'allegations . . . show that relief is barred by the applicable statute of limitations, . . . that does not make the statute of limitations any less an affirmative defense.'")[3]

Petitioners' additional arguments suggesting that this Court holds that compliance with the statute of limitations is an element of a Section 10(b) claim are equally meritless. Pet. at 13-15.

For example, in a recent opinion addressing the elements of a claim under Section 10(b), this Court held that:

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[3] *See also John R. Sand & Gravel Co. v. United States*, 128 S. Ct. 750 (2008) ("[T]he law typically treats a limitations defense as an affirmative defense that the defendant must raise at the pleadings stage and that is subject to rules of forfeiture and waiver."); Fed. R. Civ. P. 8(c) (statute of limitations classified as an "avoidance" or "affirmative defense"). That one must raise a limitations defense at the pleading stage does not transform the defense into an "element" of a claim.

> [i]n cases involving publicly traded securities and purchases or sales in public securities markets, the action's basic elements include: (1) a material misrepresentation (or omission), (2) scienter, i.e., a wrongful state of mind, (3) a connection with the purchase or sale of a security, (4) reliance, often referred to in cases involving public securities markets (fraud-on-the-market cases) as 'transaction causation,' (5) economic loss, and (6) 'loss causation,' i.e., a causal connection between the material misrepresentation and the loss"

Dura Pharms., Inc., 544 U.S. at 341 (citations omitted).

Conspicuously absent, however, is any mention of compliance with Section 10(b)'s limitations period. This makes sense, especially where the question is not whether a plaintiff alleging Section 20A claim may recover for a violation of Section 10(b), but rather, whether the predicate conduct "violates" Section 10(b).[4]

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[4] Petitioners suggest that the Court's use of the term "includes" rather than "are" means that the list of elements is non-exclusive, and that compliance with the limitations is implicitly assumed by the Court. This, again, might be so for a claim brought solely pursuant to Section 10(b), however, Petitioners fail to explain how conduct that "violates" Section 10(b) becomes any less of a violation by virtue of the fact that it is no longer actionable on temporal grounds. Petitioners further suggest that the Court held in *Central Bank, N.A. v. First Interstate Bank, N.A.*, 511 U.S. 164, 172 (1994) that the statute of limitations is an "element" of "the 10b-5 private liability scheme." Petitioners' suggestion borders on disingenuous, as revealed by the *full* quote from *Central Bank*:

This makes sense, as no purpose would be served by enacting Section 20A with a five-year limitations period, and for the express purpose of enhancing the protections accorded to investors *over and above* the implied cause of action for insider trading under Section 10(b) only to then turn around and tie the viability of Section 20A claims to the *shorter* limitations period required by the predicate violation.

Indeed, that Section 20A is special, separate, and has its own explicit five year limitations period that provides "enhanced protection" and "greater deterrence, detection and punishment of violations of insider trading" than the balance of the Exchange Act is expressly recognized by this Court. *Lampf*, 501 U.S. at 361.[5]

> "Second, in cases where the defendant has committed a violation of § 10(b), we have decided questions about the elements of the 10b-5 private liability scheme: for example, whether there is a right to contribution, what the statute of limitations is, whether there is a reliance requirement, and whether there is an in pari delicto defense." *Id.*

The foregoing shows that the Court, when using the term "element," was using the term in reference to the *overall* private liability scheme of Section 10(b), which renders the use of the term as equivalent to an *aspect* of the scheme to protect investors, rather than as a pleading element for a claim. Indeed, the Courts reference to questions of whether there Section 10(b)'s liability scheme includes a "right to contribution" or an "*in pari delicto* defense" clearly removes the use of the term "element" from the context of *pleading elements*.

[5] This Court held in *Lampf* that:

> We therefore conclude that we must reject the Commission's contention that the 5-year period

As such, all Petitioners offer this Court is simple disagreement with the *result* of the Ninth Circuit's application of well-settled law. Accordingly, their request for a writ of certiorari is merely an effort to convince this Court to review the correctness of the Ninth Circuit's application of established precedent. This is not a sufficient basis to grant the Petition.

> contained in § 20A, added to the 1934 Act in 1988, is more appropriate for § 10(b) actions than is the 1-and-3-year structure in the Act's original remedial provisions. The Insider Trading and Securities Fraud Enforcement Act of 1988, which became law more than 50 years after the original securities statutes, focuses upon a specific problem, namely, the "purchasing or selling [of] a security while in possession of material, nonpublic information," 15 U. S. C. § 78t-1(a), that is, "insider trading." Recognizing the unique difficulties in identifying evidence of such activities, the 100th Congress adopted § 20A as one of "a variety of measures designed to provide greater deterrence, detection and punishment of violations of insider trading." H. R. Rep. No. 100-910, p. 7 (1988). There is no indication that the drafters of § 20A sought to extend that enhanced protection to other provisions of the 1934 Act. Indeed, the text of § 20A indicates the contrary.

501 U.S. at 362.

3. The Court Of Appeals' Decision Is Not In Conflict With Other Appellate Decisions

In an attempt to create a compelling reason for this Court to grant certiorari review, Petitioners argue that the Ninth Circuit's decision in this case conflicts with the Second Circuit's decision in *Jackson*. *See* Pet. at 12-13. On this point, Petitioners are simply wrong – no conflict with *Jackson* exists, nor could it.

As noted by the Ninth Circuit, the court in *Jackson* was not confronted with the question of whether a violation of the Exchange Act need be timely in order to serve as the requisite predicate violation, it was confronted with the question of whether a violation of the Securities Act need be timely. 490 F.3d at 784. Indeed, Petitioners do not offer (nor do they attempt to) any explanation how Section 20A's requirement that the predicate violation be a violation "of this chapter or the rules or regulations thereunder" could be served by violation of an entirely different statute.

Petitioners further suggest that by finding that the predicate violation need not be temporally actionable, the Ninth Circuit departed from its own precedent in *Halkin v. VeriFone Inc. (In re VeriFone Sec. Litig.)*, 11 F.3d 865 (9th Cir. 1993) and ignored that of the Third Circuit in *In re Advanta Corp. Sec. Litig.*, 180 F.3d 525 (3d Cir. 1999). Pet. at 18-19. Again, Petitioners are wrong.

First, and notably unmentioned by Petitioners, is that the Ninth Circuit expressly considered and rejected Petitioners' suggestion of any conflict between the instant case and *VeriFone*. Specifically, the Ninth Circuit in this case noted that in *VeriFone* "the predicate violation collapsed because the plaintiffs failed to establish a material omission, an essential element of a Section 10(b) *violation*." 490 F.3d at 784-85. (Emphasis added). That is, the court concluded that

if there is no "material omission" *then Section 10(b) was not violated. Id.* Again, and as noted above, whether the predicate *violation* required by Section 20A occurred is not determined by whether prosecution of that violation is timely, which precludes the possibility of conflict with *VeriFone*.[6]

Petitioners' reliance on *Advanta* is equally misplaced, as that case did not involved a question of whether the predicate act needed to be timely pleaded in order to render it a "violation." In that case, the Third Circuit upheld the lower court's dismissal of Section 20A claims because plaintiffs failed to plead scienter, which meant that they had failed to "plead a predicate violation of Section 10(b) or Rule 10b-5." *See Advanta*, 180 F.3d at 541. Thus, Petitioners' suggestion that the decision in this case conflicts with that of other circuit courts is meritless.[7]

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[6] The Ninth Circuit's rejection of Petitioners' reliance on *Verifone* is further not surprising, given that its more recent decision in *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1035 n.15 (9th Cir. 2002) in which the Ninth Circuit confirmed that a Section 20A plaintiff need merely allege a predicate violation of Section 10(b). ("And to prevail on their claims for violations of § 20(a) and § 20A, plaintiffs must first ***allege a violation*** of § 10(b) or Rule 10b 5.")(emphasis added). *Id.*

[7] Petitioners attempt to raise an additional (and impermissible) argument. *See* Pet. at 19 n. 5. Specifically, they suggest that, below, they questioned "the ability of a plaintiff to use precisely the same conduct constituting the primary claim as the basis for the derivative Section 20A claim" but that the "Ninth Circuit did not address this issue." Petitioners' suggestion is disingenuous. The foregoing argument was not raised by Petitioners in their motion to dismiss (or ever) before the District Court. Nor was it raised in their petition to the Ninth Circuit for permission to appeal pursuant to 28 U.S.C. § 1292(b). Nor was such a question certified

for appeal by the Ninth Circuit. Indeed, the first time this issue was even alluded to by Petitioners was, almost as an afterthought, in their reply brief on appeal. Not surprisingly, given the improper fashion in which Petitioners sought to raise the issue, counsel for Petitioners was asked by the court during oral argument:

> "As I understand it, all we need to decide is the statute of limitations question in this case. We do not have to decide whether Kirk Kerkorian or the man who was his agent were insiders or violated a fiduciary duty or any of that stuff. Is that right?"

Mr. Landau, counsel for Petitioners, responded and rescinded any suggestion that the issue was before the court, stating:

> "That is correct your Honor. Those issues are not up before the Court. This was a pleadings motion and ***the only aspect that the Court granted the interlocutory appeal on was the strict limitations issue under 20A***." (Emphasis added).

See Oral Argument Audio File at 10:43-11:12, available for download from the Ninth Circuit website at:

> http://www.ca9.uscourts.gov/ca9/media.nsf/media+Search?openform

Petitioners may not, having repeatedly and affirmatively foregone this question below, now legitimately attempt to raise it as a purported error for this Court's review.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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